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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Sections 11
and 13 of the Cable Television
Consumer Protection and Competition
Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-trafficking Provisions

To: The Commission

MM Docket No. 92-264

COMMENTS OF LIBERTY CABLE COMPANY, INC.

Liberty Cable Company, Inc. ("Liberty") submits these comments in response to the Commission's Notice of Proposed Rule Making And Notice of Inquiry in the above-captioned proceeding implementing the Cable Act of 1992 (the "Notice").

I. INTRODUCTION

1. Liberty is a satellite master antenna television ("SMATV") operator in New York City which currently serves approximately 7,000 subscribers at dozens of sites in the New York City metropolitan area. Liberty has built the largest 18 GHz network in the United States and is a pioneer in the use of 18 GHz microwave equipment to redistribute its signal to subscriber locations. Liberty will also be among the first video programmers in the U.S. to test "video dialtone" service and technology, beginning in 1993. To the best of Liberty's knowledge, Liberty is the only SMATV company in the country that is successfully overbuilding and competing head-to-head with a local franchised cable company. Liberty's franchised competitor in New York City is

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Time Warner Entertainment Company, L.P. ("Time Warner"), which does business in Manhattan through Time Warner Cable New York and Paragon Cable Manhattan, and in the outer boroughs of New York City through B-Q Cable, QUICS and Staten Island Cable.

2. All of Liberty's subscribers are in multifamily complexes -- cooperative, condominiums and apartment buildings. All the buildings which subscribed to Liberty's service after February, 1992, had cable service prior to subscribing to Liberty's service.

3. Liberty's comments deal with two issues raised in the Notice: common ownership of a cable system and a SMATV or MMDS service within a franchise area (Notice at paras. 24-28) and limitations on participation by multichannel video programming distributors ("MVPDs") in the production of programming (Notice at paras. 56-60).

II. The Commission Should Retain Its Existing Restrictions On Common Ownership Of Cable Systems And MMDS Services And Apply Them To Common Ownership Of Cable Systems And SMATV Services.

4. Section 11 of the Cable Act of 1992 amends Section 613(a) of the Cable Act of 1934 to prohibit a cable operator from holding a multichannel multipoint distribution service ("MMDS") license or offering SMATV service in any portion of the cable operator's franchise area. The purpose of the prohibition is to promote competition in video distribution.^{1/}

^{1/}House Committee on Energy and Commerce, H.R Conf. Rep. No. 102-862, 102d Cong., 2d Sess. at 82; Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong. 1st Sess. (1991) at 47.

5. The Commission recently adopted, for the same purpose, regulations prohibiting common ownership of a cable system and a MMDS service. (Notice at para. 25).^{2/} Since these existing regulations meet Congressional intent, the Commission has tentatively concluded that the regulations are consistent with and effectively implement the Cable Act of 1992 as regards the MMDS service. (Notice at para. 26). Furthermore, the Commission has tentatively decided that these regulations should be applied to cross ownership of a cable system and a SMATV service. (Notice at para. 26). Liberty supports these tentative conclusions.

6. The existing regulations prohibiting cross ownership of MMDS and cable apply only when a franchise area lacks two or more competing cable television companies. The Commission does not propose to revise this criterion when applying the regulations to SMATV services.

7. Liberty wishes to ensure that the proposed Commission regulations re SMATV services do not prevent a SMATV operator from continuing to operate a SMATV service if the SMATV operator obtains a cable franchise to become the second franchised cable operator in an area. Liberty competes in New York City with Time Warner, which controls 98 percent of the video distribution market in New York City. Liberty should not be precluded from continuing to compete

^{2/}Report and Order in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990); Order on Reconsideration in Gen Docket Nos. 90-54 and 80-113, 6 FCC Rcd 6764 (1991); Second Report and Order in Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991).

with Time Warner by means of both a competing cable franchise and its SMATV service.

8. A cable-SMATV cross ownership prohibition should apply only in areas where there is only one cable franchisee. Such a rule is consistent with Congressional intent of promoting competition; allowing a second cable franchisee to compete with an entrenched cable operator by owning both a SMATV service and a competing cable service would enable the second cable franchisee to be a more viable competitor.

9. In fact, many unfranchised video providers are under constant pressure from local franchising authorities to obtain franchises to provide alternatives to cable. New York City has, for example, litigated without success the right to require franchises for SMATV and MMDS systems. New York City is also currently contesting Liberty's status as an unfranchised video dialtone provider. If the City prevails in its attempts to impose a franchise requirement on Liberty, Liberty's meager foothold in the New York market will be smothered by layers of regulation intended to restrain large monopolies facing no effective competition. Congress intended, by contrast, to nourish competitors to cable. This intent is effectuated by permitting cross ownership of SMATVs and cable franchises in markets where two or more cable franchises exist.

III. The FCC Should Prohibit MVPDs From Participating In Program Production Unless MVPDs Make The Programs They Produce Available To Their Competitors.

10. Section 11(c)(2) of the Cable Act of 1992 requires the Commission to consider the necessity and appropriateness of imposing limitations on the degree to which MVPDs may engage in the creation or production of video programming. The Commission has questioned the need for such limitations in light of the other structural and behavioral restrictions on cable operators contained in the Act. (Notice at para. 60). Liberty is of the firm opinion that despite the existence of other restrictions in the Act, these restrictions may not cover all situations.

11. The Commission points to Sections 12 and 19 of the Act as examples of two sections of the Act which obviate the need for FCC-imposed limitations on cable operators' participation in program production. Section 12 prohibits cable operators from requiring exclusive rights as a condition of carriage of programming of non-affiliated programmers; Section 19 requires the FCC to adopt regulations preventing a cable operator with an attributable interest in a programming vendor from establishing exclusive contracts for programming. However, in the cable program access rulemaking,^{3/} several franchised cable operators have argued that neither Section 12 or 19, nor any other part of the Act, precludes a cable operator from producing programming and refusing to make that programming available to competing MVPDs. In addition,

^{3/}MM Docket No. 92-265, Development of Competition and Diversity in Video Programming Distribution and Carriage.

franchised cable interests have argued that Section 19's restrictions are applicable only to programs sent by the programmer via satellite and not to programs transmitted via wire, cable or other technology. Under such arguments, Section 19's restrictions would not preclude a program vendor affiliated with a cable operator from refusing to make available to a competing MVPD programs sent by a means other than satellite.

12. In Liberty's experience, such arguments mean that Time Warner would continue to refuse to make available to Liberty "Channel One Local News" which is a program produced by Time Warner and presented on Time Warner's New York City cable systems. Since the program is not sent by satellite, franchised cable operators would argue that Sections 12 and 19 do not require Time Warner to make the program available to Liberty. Qualifying a competitor's rights to program access exclusively by whether the program is satellite delivered fails to account for an emerging preference for cable operators to deliver programming by fiber as Time Warner has just announced it will do in Orlando, Florida. The clear intent of Congress is to free programming controlled by cable. This intent should not be thwarted by the ability of a cable operator's programming affiliate to elect to use a delivery system other than satellite.

13. Prohibiting cable operators from any involvement, directly or indirectly, in the production of programming unless the cable operator makes programming available to other MVPDs (on the same terms and conditions as the programming is available to the

operator's system or to other cable systems) would fill any gap argued to exist by franchised cable operators. Moreover, such a prohibition would not inhibit the development of new programming services; a cable operator would not find it economically feasible to decline to produce programming (which it otherwise had an economic incentive to produce) merely to avoid selling it to other MVPDs. For these reasons, Liberty urges the FCC to prohibit cable operators from participating in the creation or production of any programming unless that programming is made available to other MVPDs on the same terms and conditions as the programming is made available to cable system operators.

WHEREFORE, Liberty Cable Company, Inc. respectfully requests the Commission to adopt rules in this proceeding consistent with the views expressed herein.

Respectfully submitted,

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